

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DENNIS COSBY

APPELLANT

VS.

NO. 2009-KA-1300-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

**BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO. [REDACTED]**

**OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680**

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PROCEDURAL HISTORY:

On August 3, 4, 2009, Dennis Cosby, "Cosby" was tried for the murder of his wife before a Panola County Circuit Court jury, the Honorable Andrew Baker presiding. R. 5-165. Cosby was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 165.

Cosby through counsel filed notice of appeal. C.P. 32.

ISSUES ON APPEAL

I.

WAS JURISDICTION PROPERLY ESTABLISHED?

II.

**WAS THERE CREDIBLE EVIDENCE IN SUPPORT OF A
DENIAL OF A MOTION FOR A JNOV?**

III.

**WAS THERE CREDIBLE EVIDENCE IN SUPPORT OF A
DENIAL OF A MOTION FOR A NEW TRIAL?**

STATEMENT OF THE FACTS

On November 7, 2008, Cosby was indicted for “deliberate design” murder of Mrs. Wendy Cosby, his wife, at some time between November 24, 2007 and February 10, 2008 by a Panola County Grand jury. This was under M. C. A. Sect. 97-3-19(1)(a). C.P. 5.

On August 3, 4, 2009, Dennis Cosby was tried for murder before a Panola County Circuit Court jury, the Honorable Andrew Baker presiding. R. 5-165. Cosby was represented by Mr. David L. Walker, the Panola County public defender.

Officer Brandon Hodges, a Tallahatchie County criminal investigator, testified that he went to the Tallahatchie River. R. 13. This was on February 10, 2008. R. 13. This was after being notified that a decomposed body had been recovered there. See State’s photographic exhibit 4. It shows a cadaver as seen by investigators after it was removed from the river. “A ring” was found on the left hand of the female decedent. See State’s photograph 5 which shows the ring on the decomposed corpse on the beach near the river.

Officer Hodges testified that he was notified by Panola County law enforcement that Mrs. Wendy Cosby was missing. R. 20. R. 21. Mr. Cosby was contacted for a statement. Cosby admitted that his wife had been missing for many months. Cosby claimed she had been missing since after Thanksgiving in “November, 2007.” When shown the ring found on the decedent, he admitted it was his missing wife’s ring. R. 20.

DNA tests confirmed that the decomposed body was that of Mrs. Cosby. R. 21-22. It was determined that Cosby had not initially reported his wife missing. Law enforcement was initially informed that she had disappeared by the decedent’s sister, Ms. Ealy. R. 35.

Officer Hodges testified that Cosby had initially stated that his wife had left home and never returned. R. 122. At a subsequent interview, Cosby admitted to hitting the decedent “hard” in the

top of the head. This “knocked her out.” R. 40. Cosby also admitted to taking her to Paducah Wells Road in Tallahatchie County. There he dropped her off the bridge into the Tallahatchie River. He believed she was alive at that time.

Mr. Mark Whitten, an investigator with the Panola County Sheriff’s office, testified that Mrs. Cosby was reported missing. She was reported missing by her sister, Ms. Sandy Ealy. R. 35. Cosby had not reported his wife missing from her home. DNA test confirmed the identity of the decomposed body found in the river. R. 37.

At a post-**Miranda** interview, Cosby admitted to hitting her “hard” in the head and “knocking her out.” R. 39-40. He put her body in his pick up truck. He then took her to Tallahatchie County. This was where he admitted that he had “dumped her body over the bridge” into the river. R. 39.

See state’s exhibits which are in the manila envelop marked “Exhibits.” State’s photographic exhibit 4 shows the decomposed body of a Caucasian female. This is how the decomposed cadaver appeared to investigators when removed from the river. State’s exhibit 5 is a photograph which shows a ring on the left finger of this corpse found in the Tallahatchie River. State’s exhibit 7a, 7b, and 7c are photographs showing the Paducah Wells Bridge over the Tallahatchie River. 7a shows the bridge from a perspective of someone below the bridge in a boat on the river. 7b shows the bridge from the road as it would be seen by a driver in a vehicle crossing the river. 7c shows the concrete barriers along the sides of the bridge. State’s exhibit 10 in the manila envelop is a transcription of the recording made of a post-**Miranda** interview of Cosby by Investigator Mark Whitten. In that interview Cosby admitted to knocking his wife out with a blow to her head. He then took her to the Paducah Wells Bridge where she was dumped into the river. An audio CD made from the transcript was played for the jury. R. 56-58. See Exhibit 10 , page 4-27 in manila envelop

marked Exhibits.

Dr. Steven Hayne testified that he performed an autopsy on the decedent, Mrs. Cosby. He testified that the cause of death was what appeared to be a stab wound to her upper left chest which penetrated her left lung. R. 74. See State's exhibit 12 in manila envelop marked "Exhibits." This is "a body diagram" sketch. It shows the location of the stab wound on the upper left side of the figure's chest. Dr. Hayne ruled the manner of death as "a homicide." R. 74. Dr. Hayne testified that this injury could be the result of the victim "being impaled on an object" below in the river. R. 73.

At the conclusion of the state's case, the trial court overruled a motion for a directed verdict based upon lack of jurisdiction and venue. R. 84-85. The trial court found evidence of a continuing criminal enterprise based upon the evidence presented. The court also found that the issue of self defense, based upon Cosby's inculpatory statements to investigators, would be a jury question. The defense agreed with this assertion. R. 83.

Cosby testified in his own behalf. R. 91-128. In Cosby's testimony he claimed that the victim committed "suicide." R. 127. When he took her to Tallahatchie County, she allegedly "jumped out of the truck" at the bridge over the river without his assistance. R. 111-112.

On cross examination, Cosby admitted that he had initially provided different versions of what occurred. This was supposedly the result of the investigators suggestions. R. 113. Cosby admitted that 11 days after his wife disappeared from her home, he arranged for her social security check to be sent to him as her survivor. R. 126.

The trial court denied a second motion to dismiss for lack of jurisdiction and/or venue. R. 132-133. This came after Cosby's testimony. R. 91-128. This was based upon the fact that the body of the deceased Mrs. Wendy Cosby was not discovered in Panola County but rather in the river in Tallahatchie County. His counsel claimed that Cosby's testimony provided no basis for concluding

that a crime was committed in Panola County.

The trial court found that Crosby's statement of striking the deceased on the head in Panola County, and then dumping her body into the Tallahatchie River was sufficient for establishing jurisdiction in Panola County.

An instruction for self defense was denied. R. 134. The trial court found from Cosby's testimony no indication of any fear of harm from his wife at the time he admitted to taking her to the river. R. 100-101;111. There was no objection. Cosby was given an instruction for manslaughter. C.P. 18. The trial court also denied D-1, a motion of acquittal. C.P. 25.

Cosby was found guilty and given a life sentence in the custody of the Mississippi Department of Corrections. R. 165.

A motion for a JNOV and/or a New Trial was filed. The issues raised were alleged lack of jurisdiction, overwhelming weight of the evidence, and denial of a not guilty of murder instruction, D-1. C.P. 27-28.

A hearing was held on that motion. R. 160-167. The trial court denied the motion. R. 164; C. P. 29. The trial court found that the court had jurisdiction over the case based upon Cosby's own admissions and other factual evidence and inferences from that evidence. The trial court also found there was sufficient credible, evidence in support of denying post conviction relief motions. R. 164-166.

Mr. Cosby's counsel filed notice of appeal. C.P. 32.

SUMMARY OF THE ARGUMENT

1. The record reflects that trial court found that jurisdiction and venue was proper in the first judicial district of Panola County. R. 84-85; 132-133. The trial court found Cosby's inculpatory statements, testimony and other evidence in the record provided sufficient evidence for establishing jurisdiction in Panola County's first judicial district.

Cosby stated to Officer Whitten that he "knocked her out." This was with a "hard" blow to her head. See state's exhibit 10 page 4-27 in manila envelop for Cosby's post-**Miranda** statement to Officer Mark Whitten. This allegedly occurred in Panola County. R. 40. After she was incapacitated, Cosby stated that he took her in his truck into Tallahatchie County. This was where her body was dumped into the river. It was found floating in the river months later by law enforcement. Exhibit 10, page 12. In his testimony, he claimed she "jumped out of the truck" at the bridge over the river. R. 111.

The trial court found by statute that jurisdiction was proper either in Panola or Tallahatchie County. The recording of this interview with investigators was played for the jury. R. 56-58.

See M. C. A. Sect. 99-11-21, **McBride v. State** 934 So.2d 1033, 1035 (Miss. App. 2006), and **Durr v. State** 168 So. 65, 67 -68 (Miss. 1936).

2. The record reflects that the trial court denied a motion for a directed verdict and a motion for a JNOV or New Trial. R. 84-85; 164-166; C.P. 29. When the evidence presented by the prosecution was taken as true with reasonable inferences, there was more than sufficient credible evidence in support of the trial court's denial of peremptory and post conviction motions. There was no burden on the prosecution to prove exactly when and where the victim died, as is assumed by Cosby's argument on appeal. The only burden was that of proving the elements of the deliberate design murder beyond a reasonable doubt.

There was forensic evidence indicating that the victim died from a chest wound that punctured her left lung. R. 74. Cosby admitted in his post **Miranda** statement to knocking his wife out. This was with a “hard” blow to her head. He then allegedly took her to Tallahatchie County. On the bridge over the river, he “dumped” her body into the water. Exhibit 10, page 4-27. He heard a “thud” when she went over into the river. Exhibit 10, page 14.

Officer investigator Hodges testified to finding Mrs. Wendy Cosby’s body in the river. This was on February 10, 2008. R.13. “A ring” found on the decedent was identified by Cosby as belonging to his wife. R. 20-21. See photographic exhibit 5. Through genetic DNA analysis it was determined the body found in the river was the remains of the victim, Mrs. Wendy Cosby. R. 21-22.

Prior to the finding and identifying of the body, Cosby had not reported his wife missing. However, he arranged for her social security check to be sent to him as her marital survivor. R. 126. This provided a motive for Cosby’s actions. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993).

In his testimony before the jury, Cosby admitted to taking the decedent to Tallahatchie County. She allegedly went voluntarily but jumped out of the truck unexpectedly. She allegedly committed “suicide” while in his presence. R. 111-112.

There was no “injustice” involved in denying a motion for a new trial. **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994). Cosby made his own credibility the central issue in his trial. R. 91-128. The jury did not find from Cosby’s contradictory accounts of his actions that he acted “in necessary self defense.” The appellee would submit that forensic evidence and testimony from investigators along with Cosby’s admissions were sufficient for establishing all the elements of “deliberate design murder.”

The trial court found a lack of evidence for a self defense instruction. R. 134. There was no objection to denial of the instruction. R. 134. According to Cosby’s testimony, the wife “jumped

out” of his truck at the bridge over the river. R. 111. The only issue of self defense was the factual issue of whether Cosby acted “in necessary self defense” based upon all the evidence presented. The jury found from all the facts presented that he did not.

ARGUMENT

PROPOSITION I

JURISDICTION AND VENUE WERE PROPER IN THE INSTANT CAUSE.

Crosby argues through counsel that the trial court erred in denying his motion to dismiss for failure to have jurisdiction and venue. He argued before the trial court that the proper jurisdiction and venue was in Tallahatchie and not in Panola County's first judicial district. Cosby believes his version of what occurred was the only evidence available at trial. In that account, he told investigators that the deceased wife was alive when taken out of Panola County. He therefore believed that her death occurred in Tallahatchie County. This was where her decomposed body was found by investigators in the river. Appellate's brief page 1-19.

The record reflects the trial court denied a motion to dismiss for failure to establish jurisdiction and venue in Panola County. R. 84-85; 132-133. The second motion occurred after Cosby had testified in his own behalf. R. 91-128. His testimony contradicted his previous inculpatory statements to investigators. He testified before the jury that his wife committed suicide. R.111; 127. Previously, he admitted to knocking her out and dumping her body over a bridge into a river.

As stated by the trial court on jurisdiction:

His version this morning is totally different. If I could rule based on his version this morning, I would probably go home and not even submit it to the jury. But that's not the way it is. **There is substantial evidence out there that would lead the prosecution to believe this matter began in Panola County and no one could tell us for sure when death occurred based on his first version whether it occurred at the trailer or whether it occurred en route from where they lived to the river or after she was deposited into the river. I don't think all of that makes any difference. I think there is sufficient evidence before the jury from the defendant's own testimony, to vest venue in Panola Count based upon Section 99-11-15 and 99-11-19 and 99-11-21. I think any one of those statutes permit the prosecution to be had in this county. The motion is, therefore, overruled.** R. 132-

133. (Emphasis by appellee).

State's Exhibit 10 is a copy of Cosby's post- **Miranda** inculpatory statement to investigator Mark Whitten. It is contained in manila envelop marked "Exhibits." An audio CD from which the transcript was made was played for the jury. R. 56-58.

In this statement, Cosby admitted he hit the victim in the head "hard." This "knocked her out." Exhibit 10, page 12. He then moved her body to his truck. He drove to a river and "I throw her off the bridge." When he threw her off the bridge, he heard a "thong or a thud."

As stated by Cosby in the interview:

181. Okay.

182. Cosby: I hit her I must have hit her hard and, and she just kind of ah trickled down it's like she just knocked her out.

183. Mark Whitten: Okay.

184. Cosby: Blacked out and she was there and I turned her look you know she was just breathing but she wouldn't you know if you held her head up she wouldn't it would fall back over you know laying down and I just went and just went blanked seem like and after several minutes I took her and I put I was I put her in the truck in the back. Page 12.

...

190... and bagged (sic) up and, and sat there and I, I put in park I got, I got back there and I couldn't get her to wake up and I, and I and ah I throw her off the bridge.

191. Mark Whitten: Okay.

192: Hodges: While you was back there with her at that point could you tell that she was still alive or was she gone.

Cosby: Well I, I couldn't, I couldn't say, I really couldn't say. Page 13.

...

...

205. Cosby: Right yeah and ah, and ah I picked, picked her up struggled with her and then just at ah just at ah blank throw her over well throw her over the side and I heard a clunk like a thong or thud or some kind...it, it was more of a thong and I just it seem like I just realized what I had done... exhibit 10, page 14.

281. I want to kind of cover something that we told you that the autopsy showed that she had been stabbed.

282. Cosby: Uh huh.

283. Whitten: **And you have denied that you had stabbed her is that right?**

284. Cosby: **That's right.**

285. Whitten: **Okay and you thanking (sic) whatever she hit in the water maybe.**

285. Cosby: **Uh huh.**

286. Whitten: **Is what penetrated her.**

287. Cosby: **That, that's the only thing.**

288. Whitten: **Okay alright.**

289. Cosby: **Cause I heard a thong or thud.** Page 18-19. (Emphasis by appellee).

M. C. A. Sect. 99-11-21 states that when a person is attacked or incapacitated in one county and their body is moved and "death occurs in another county," jurisdiction is proper in either of these two relevant counties. As stated:

Where the mortal stroke or other cause of death occurs or is given or administered in one county and the death occurs in another county, the offender may be indicted and tried in either county.

Under Mississippi Rules of Civil Procedure, rule 82, "jurisdiction and venue," it states that "where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought."

Dr. Steven Hayne testified that he conducted an autopsy on the decedent. This was on February 11, 2008. R. 67-68. He determined that the cause of death was "a stab wound to the left

chest.” This would have resulted in massive internal bleeding. He also believed based upon his examination of the body that this was “a homicide.”

Q. I will ask you this just hypothetically, would it be possible once Wendy Cosby was rolled off the bridge to have been basically impaled on an object below in the river that caused that type of injury?

A. That’s possible, yes, counselor. R. 73.

...

Q. Dr. Hayne, based upon your postmortem examination, were you able to determine a cause of death?

A. Yes, sir.

Q. And what was that?

A. It was a stab wound to the left chest.

Q. And were you able to determine a manner of death?

A. Yes, sir.

Q. And what was that, please?

A. I ruled it homicide, sir. R. 74.

...

Q. Dr. Hayne, would it be possible for somebody to be knocked unconscious with the palm of a hand, placed into the back of a car in relatively cold and rain, and not wake up?

A. Counselor, I would say it is possible but unlikely. R. 75. (Emphasis by appellee)

In **McBride v. State** 934 So.2d 1033, 1035 (Miss. App. 2006), the trial court found “venue” was proper in Leake County. Although the victim’s body was found in Attala County, there was evidence the victim was shot in Leake County. She was then carried into and abandoned for dead in Attala county. As stated by the Court of Appeals:

¶ 10. “In criminal cases, venue is jurisdictional, must be proved, and may be raised

for the first time on appeal.” **Hensley v. State**, 912 So.2d 1083, 1086(¶ 12) (Miss. Ct. App.2005). The State bears the burden of proving venue beyond a reasonable doubt. **Hill v. State**, 797 So.2d 914, 916(¶ 10) (Miss.2001). Venue may be proven by direct and circumstantial evidence. **Hensley**, 912 So.2d at 1086(¶ 12). **Where there is sufficient evidence to lead a reasonable trier of fact to conclude that part or all of the crime occurred in the county where the case is being tried, then evidence of venue is sufficient.** **Hill**, 797 So.2d at 916(¶ 12). (Emphasis by appellee).

In **Durr v. State** 168 So. 65, 67 -68 (Miss. 1936), the Supreme Court found jurisdiction was proper in the county where death occurred although the victim was initially struck in the head in another county. Prosecution would have been proper in either county given the continuing series of events that occurred from the initial attack until the death of the victim.

It appears from the record that the blows from which the appellant died were inflicted in Jefferson Davis county, while the death occurred in Covington county. Section 1187, Code of 1930, provides that “where the mortal stroke or other cause of death occurs or is given or administered in one county, and the death occurs in another county, the offender may be indicted and tried in either county,” and under this statute jurisdiction attaches in the county where the prosecution is first begun.

In his testimony, Cosby testified that his wife voluntarily went to the river. At the bridge over the river, “she jumped out of the truck.” R. 111.

The appellee would submit that the record reflects adequate support for the trial court’s ruling on jurisdiction and venue. Cosby’s argument depends upon his claim that no criminal actions occurred in Panola County. This is based upon his interpretation of his uncorroborated statements admitted into evidence.

However, his own **Post-Miranda** inculpatory statements would seem to suggest otherwise. Exhibit 10, page 12-19.. Cosby did not deny having made inculpatory statements before the jury. These were his admissions of knocking his wife out and dumping her in the river. He claimed before the jury these admissions were the result of the prosecution’s suggestions. R. 125. The trial court found that it would be the jury’s responsibility to determine his credibility on these crucial factual

issues.

Therefore, the appellee would submit that, based upon the record cited by the trial court, these jurisdictional and venue issues are lacking in merit.

PROPOSITION II & III

THERE WAS CREDIBLE, SUBSTANTIAL PARTIALLY CORROBORATED EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DENIAL OF POST CONVICTION MOTIONS.

Cosby argues that the trial court erred in denying his motion for a JNOV or a New Trial. He believed that the trial court lacked jurisdiction and venue since his statements to investigators and testimony did not allegedly indicate any "intent" to commit murder in Panola County. His initial statement to Officer Mark Whitten was that he threw his alleged drug addicted wife into a river in Tallahatchie County. Exhibit 10, page 12-13. However, his testimony was that she apparently "jumped" into the river in Tallahatchie County. The only admission involving Panola County was to striking her on the top of the head. This was during "a marital spat" at their trailer home. According to Cosby, this blow did not result in her death. Cosby consistently stated his wife was alive while in Panola County. Therefore, he thinks jurisdiction should have been in Tallahatchie County where she allegedly died.

As shown under Proposition I, the trial court found that there was sufficient evidence for determining that jurisdiction and venue were proper in either Panola or Tallahatchie County. Jurisdiction and venue can be established through "direct and circumstantial evidence." R. 84-85; 132-133. **Hensley, supra.**

There was evidence based upon the investigation for inferring that a series of actions occurred which began in one county and ended in another. This would be an apparent initial physical attack in Panola County and removal of the incapacitated victim with her subsequent death apparently occurring in neighboring Tallahatchie County.

It was not contested that the victim's decomposed body was found in Tallahatchie County. Cosby admitted to taking his wife in his truck to Tallahatchie County. Exhibit 10, page 12-13. This

is where he either threw her in the river or she jumped into the river, depending upon which of his various accounts is accepted as credible. R. 13-14; 111; 123.

Mr. Cosby argued that there was insufficient evidence in support of his murder conviction. Based upon his testimony about his alleged false confessions to investigators and his wife's alleged unexpected "suicide" at the Tallahatchie River Bridge, he believed there was a lack of evidence to convict him of murder. R. 91-128. He does not think his statements to Officer Whitten provided any basis for inferring any "deliberate design" to murder his estranged wife.

The appellee would submit that when the evidence cited from the record was taken as true with reasonable inferences, there was sufficient credible, evidence for the trial court to deny both a motion for a JNOV and a motion for a new trial. C.P. 29.

The forensic evidence established "the cause of death" was a stab wound. This was a wound to the upper left chest which punctured the left lung. R. 74. The body was found in the Tallahatchie River thirty miles from Cosby's home in Panola County. R. 13. There was a ring on the finger of the decomposed unidentified white female corpse. R.17. Cosby admitted that this was his wife's ring. R. 20; 127. The body was identified through DNA analysis as being that of the victim's wife, Wendy Cosby. R. 21-22.

Cosby initially told law enforcement that his wife took some clothes and left him in late November, 2007. R. 95; 122. He did not report her missing. At a subsequent interview, he admitted that he had his wife's social security check sent to him as her survivor. R. 126. This was prior to her body being found or identified.

Q. Okay. And then 11 days after your wife disappeared or jumps off the bridge you immediately go down and change social security so you get the money, right?

A. No, sir.

Q. What did you do?

A. Left to my children.

Q. Well, who takes care of the money for your children?

A. Me.

Q. You got the money, didn't you?

A. Well, it goes—I have receipts for everything that's bought.

Q. And what about the thousand dollars a month that she was spending, who gets that now?

A. My bills. I paid my folks back. R. 126.

When investigators had gathered more information about the circumstances under which the victim disappeared, they interviewed Cosby a third time. In this recorded post-**Miranda** statement, Cosby admitted to hitting her “hard” in the head, which “knocked her out.” Exhibit 10, page 12. He then took her in his truck to the Tallahatchie River. This is where he “throw her” over the side into the river below. Exhibit 10, page 13. He did not report her missing. Exhibit 10, page 4-27.

In his testimony before the jury, Cosby changed his story. He claimed that at the Tallahatchie River, his wife “jumped over the bridge” and disappeared, near the river. R. 111; 127. He believed she committed “suicide” by jumping into the river. R. 127. Cosby testified that his statements about throwing his wife into the river were what investigators wanted him to say. R. 108. He went along with their version because at that time he was afraid of the consequences of being possibly tried for murder. R. 124-125.

If his inculpatory statement to investigator Mark Whitten was accepted as true then it could be reasonably inferred that, the victim struck something which penetrated her chest cavity. In Cosby's statement he described hearing “a thong or a thud.” This was when his wife's body was

falling down into the river. Exhibit page 10, page 13-19.

Mr. Cosby admitted that he struck the victim "hard." He struck her on the head which "knocked her out." Cosby's actions in striking her and dumping her in the river were "deliberate," planned actions. Based upon these admissions, it could be reasonable inferred that Cosby was responsible for her death however it may have specifically occurred.

The issues of exactly when, where and how the victim died were not crucial. There was no burden on the prosecution to prove exactly when, where and how the victim died, as is assumed by Cosby' counsel on appeal.

As to the motive for his actions, Cosby admitted that as a result of her death, he was no longer in a financial bind. As a result of his actions, he had some thousand dollars a month that he claimed the victim had been allegedly spending on crack cocaine. R. 126.

As to the related claim of self defense, the record reflects that it was raised during argument in a motion for a directed verdict. It was incorporated into Cosby's argument concerning alleged improper jurisdiction and venue. R. 80-82. It assumed for argument that Cosby had not admitted that any crime was ever committed in Panola County. He merely admitted to hitting his wife in alleged self defense. If a crime occurred, it happened when he admitted to pushing or throwing her into the river.

The defense admitted that the self defense issue would be a jury question. R. 83.

In his inculpatory statement to investigators, at most, Cosby claimed the victim scratched and hit him several times. This was allegedly after he refused her money for her drug habit. He then hit her "hard" in the head which allegedly incapacitated her. He never claimed she was armed or that he was in fear of death or bodily harm at the time he struck her. He did not admit any fear of harm from her when he pushed her into the river. Exhibit 10 page 12-13.

In Cosby's testimony, he testified that she went voluntarily with him in his truck to the river, and then "jumped out" unexpectedly. There was never any struggle, fight, or any fear of harm. R. 111. In other words, in his testimony, unlike his pre-trial admissions, his wife committed "suicide." There was no confrontation or provocation. R. 125.

The record reflects that the jury found in their deliberations, from all the testimony and evidence presented, that Cosby had not acted "in necessary self defense." See jury instruction S-1. C.P. 15.

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeal's court.

The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); *Wetz* at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Wetz*, at 808, **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); *May* at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);...We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz* at 808; *Harveston* at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the evidence cited above was taken as true with reasonable inferences, there was more than sufficient credible, partially corroborated evidence in support of the trial court's denial of post

conviction motions. As shown under proposition I, jurisdiction was established through direct and circumstantial evidence as being in Panola County, given pre-trial evidence of criminal enterprise beginning in one county and terminating in another.

There was evidence for concluding that Mrs. Wendy Cosby was the living wife of Cosby prior to her unexpected demise. There was evidence that Cosby without authority of law, and when not acting in necessary self defense, did, through a series of aggressive actions, attack Wendy Cosby. After incapacitating her by a blow to her head, he deliberately disposed of her while she was unconscious, dead, or in the process of dying. Exhibit 10, page 12-18,

Striking her in the head “hard,” and dumping her into the river were “deliberate actions” requiring forethought and planning. Cosby has yet to claim any fear of bodily harm to himself from the decedent at the time he dumped her body over the bridge. See jury instruction S-1, C.P. 15.

The appellee would therefore submit that there was sufficient credible evidence for establishing each of the elements for a conviction for deliberate design murder.

In **Jones v. State**, 635 So. 2d 884, 887 (Miss. 1994), the Mississippi Supreme Court stated that a motion for a new trial should be denied unless doing so would result in an “unconscionable injustice.”

Our scope of review is well established regarding challenges to the weight of the evidence issue. Procedurally, such challenges contend that defendant’s motion for new trial should have been granted. Miss. Unif. Crim. R. of Cir. Ct. Prac. 5.16. The decision to grant a new trial rests in the sound discretion of the trial court, and the motion should not be granted except to prevent “an unconscionable injustice.” **Wetz v. State**, 503 So. 2d 803, 812 (Miss. 1987). We must consider all the evidence, not just that supporting the case for the prosecution, in the light most consistent with the verdict.” **Jackson v. State**, 580 So. 2d 1217, 1219 (Miss. 1991), and then reverse only on the basis of abuse of discretion.

When the testimony cited above was taken as true with reasonable inferences, there was sufficient credible evidence in support of the trial court’s denial of a motion for a JNOV or a new

CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Andrew C. Baker
Circuit Court Judge
Post Office Drawer 368
Charleston, MS 38921

Honorable John W. Champion
District Attorney
365 Loshier Street
Suite 210
Hernando, MS 38632

David L. Walker, Esquire
Attorney at Law
Panola County Public Defender
Post Office Box 719
Batesville, MS 38606

This the 9th day of December, 2009.



W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680